

BOARD OF REGISTERED NURSING
Administrative Committee
Agenda Item Summary

AGENDA ITEM: 3.0

DATE: June 14, 2011

- ACTION REQUESTED:** Enforcement-Regulation Proposals
- California Code of Regulations, Article 1, Section 1403, Delegation of Certain Functions
 - California Code of Regulations, Article 2, Section 1410, Application
 - California Code of Regulations, Article 4, Section 1441, Unprofessional Conduct
 - California Code of Regulations, Article 4, Section 1443.6, Required Actions Against Registered Sex Offenders
 - California Code of Regulations, Article 4, Section 1444.5, Disciplinary Guidelines
- REQUESTED BY:** Jeannine Graves, RN
President

BACKGROUND:

At its April 13, 2011, meeting, the Board voted to convene a meeting on June 14, 2011, to determine its responses to the public comments on and any modifications to the Enforcement-Regulation Proposals. Prior to the April meeting, Board members were sent a copy of the written comments, and staff provided a written summary of the comments at the meeting. No one testified at the public hearing on the matter. Following are proposed responses to the comments, and the proposed modified regulatory language is attached.

GENERAL COMMENTS: The Board's authority to promulgate the Enforcement-Regulation Proposals was questioned and an explanation for the selection of the elements of SB1111 incorporated in the regulatory proposals was requested. **Reject.**

Proposed Response: Business and Professions Code (BPC), Section 2715 authorizes the Board to adopt, amend, or repeal rules and regulations as reasonably necessary to enable it to implement the provisions of the Nursing Practice Act. Each of the proposed regulatory actions is predicated on this authority, and the specific section of the Nursing Practice Act that is being acted on is cited in the Reference Section of each regulatory proposal. The regulatory proposals were selected from SB1111 based on the Board's determination that they would enhance implementation of the Enforcement Program and that the Board possessed the requisite statutory authority to take the proposed action.

SPECIFIC COMMENTS AND RESPONSES:

Amend Section 1403 - Delegation of Certain Functions

Delegate to the Executive Officer (EO) the authority to approve settlement agreements for the revocation, surrender, or interim suspension of a license.

Comments and Proposed Responses:

1. Require that any action pursuant to this new authority be publicly reported to the Board. **Accept.**

Proposed Modification: Require that actions taken pursuant to the new delegated authority be publicly reported to the Board.

2. Current duties delegated to the EO in Section 1403 are generally limited to duties with an administrative function. The delegation of authority to approve disciplinary actions appears inconsistent with currently delegated functions. **Reject.**

Proposed Response: BPC, Section 2708 speaks to the issue of the Board delegating duties to the

Executive Officer, and reads in pertinent part: “The board shall appoint an executive officer who shall perform the duties delegated by the board...” The statute does not limit the type or nature of duties that may be delegated. Thus, the Board has the authority and responsibility for determining which duties to delegate and may do so long as such action does not violate any statute and is consistent with the Board’s public protection mandate.

3. Clarify in proposed regulations which types of settlement cases will be retained under the current voting process by the Board members. **Reject.**

Proposed Response: The proposed regulation clearly specifies which settlement cases the EO *is* authorized to take action on. The Board retains authority for all others; it is unnecessary to specify these settlement cases in the regulation.

4. Change the words “settlement agreement for interim suspension” to words that can be easily distinguished from the order obtained pursuant to BPC, Section 494. **Reject.**

Proposed Response: The purpose of this regulatory change is to allow the Executive Officer to adopt a stipulation for an interim suspension that is sought pursuant to Section 494 of the Business and Professions Code (all section references are to that Code). Under Section 494, a board or an administrative law judge may, upon petition, issue an interim order suspending any licensee or imposing license restrictions. While the majority of interim suspension orders (ISO) are heard before an administrative law judge, there may be situations where upon receipt of the petition, the licensee acknowledges the severe nature of the alleged violation and wishes to stipulate to an ISO rather than go through a hearing. It is this type of situation where the Board believes that it is appropriate for its EO to adopt such a stipulation imposing an interim suspension. Such action would quicken the process for obtaining an interim suspension. A stipulation would occur only if the licensee agreed to the ISO.

5. Specify that the EO’s designee may perform the delegated duties specified in Section 1403, if the EO is “not available,” rather than in the EO’s “absence from the office of the board.” **Reject.**

Proposed Response: The comment is not responsive to the regulatory proposal.

Section 1410 – Application

Require an applicant for licensure to undergo an evaluation and/or examination if it appears the applicant may be unable to practice nursing safely due to mental and/or physical illness. The Board is required to pay for the examination.

Comments and Proposed Responses:

1. Change the language to make it consistent with the authority provided in Section 820 of the BPC, i.e., an applicant’s failure to comply is grounds for denial of license. **Reject.**

Proposed Response: Section 1410 proposes that where an applicant has been ordered to undergo an evaluation, but fails to do so that his or her application would be deemed to be incomplete. An incomplete application cannot be acted upon. It would be more accurate to characterize the failure to obtain an evaluation as an incomplete application rather than a denied application.

2. Add and clarify the process to be used to require the applicant to take an examination. **Accept.**

Proposed Modification: Section 1410 could include language to provide that if the Board determines that the applicant’s ability to practice nursing safely is impaired because of the applicant is mentally ill or physically ill affecting competency, the Board may deny the applicant’s license application. The Board shall not grant a license to an applicant who was denied a license because it was determined that the applicant’s ability to practice nursing was impaired due to mental illness or physical illness affecting competency until it has received competent evidence of the absence or control of the condition which caused its action and until it is satisfied that with due regard for the public health and safety the person’s application for licensure may be safely granted.

3. Clarify and add the disciplinary options applied to applicants, e.g., license denial, conditional (probationary license), just as in BPC, Section 822, for licensees. **Reject.**

Proposed Response: The denial of a license for failure to undergo an ordered evaluation or to deny the license because the applicant is unable to practice safely is not disciplinary since the applicant does not have a license to discipline. Such a decision to deny is based upon a lack of qualifications.

Section 1441 - Unprofessional Conduct

Defines specified acts as unprofessional conduct.

Comments and Proposed Responses:

1441(a) Inclusion of “gag clauses” in civil disputes. The term “civil dispute” is unclear. **Accept.**

Proposed Modification: Change to “civil action for damages.”

1441(b) Failure to provide lawfully requested copies of documents. The section does not apply to a licensee who does not have access to or control over medical records. Change “medical record” to “record.” **Accept, with modification to provide further clarity and internal consistency.**

Proposed Modification: Change “medical records” to “documents.”

1441(d)(1) and 1441(d)(2) Require licensees to report arrests and convictions. Delete the requirements based on lack of fairness, punitive, and process issues.

Proposed Modification: Delete the subsections. The Department of Justice provides subsequent arrest and conviction reports to the Board.

Section 1443.6-Required Actions Against Registered Sex Offenders

Sets forth the disciplinary action to be taken by the Board if an applicant for licensure, licensee, or petitioner for reinstatement of a revoked license is required to register as a sex offender, and specifies the circumstances in which the Section does not apply. Subsection (b)(2) exempts from the provision of this regulation an individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code.

Comments and Proposed Responses:

1. Delete (b)(2) and/or provide clarification for the exemption. **Reject.**

Proposed Response: PC Section 314 pertains to indecent exposure-related misdemeanor violations. The nature and circumstances of the underlying violation may be of a less egregious nature and may not warrant license revocation to protect consumers. The Board will review these cases on an individual basis, and will impose appropriate disciplinary action, including revocation, based on the specifics of the cases.

2. Introduce additional proposed regulations with absolute bars to licensure for greater preemptive and preventative public protection. **Reject.**

Proposed Response: At this time, the Board is limiting the regulatory proposal to actions against registered sex offenders.

Attachment: Proposed modified regulatory language.

NEXT STEPS:

Continue with the regulatory process.

FISCAL IMPLICATIONS, IF ANY:

PERSON TO CONTACT:

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PROPOSED MODIFIED TEXT

6-14-11

BOARD OF REGISTERED NURSING

Specific Language of Proposed Changes

1403. Delegation of Certain Functions.

(a) The power and discretion conferred by law upon the board to receive and file accusations; issue notices of hearing, statements to respondent and statements of issues; receive and file notices of defense; determine the time and place of hearings under Section 11508 of the Government Code; issue subpoenas and subpoenas duces tecum; set and calendar cases for hearing and perform other functions necessary to the efficient dispatch of the business of the board in connection with proceedings under the provisions of Sections 11500 through 11528 of the Government Code, prior to the hearing of such proceedings; to approve settlement agreements for the revocation, surrender or interim suspension of a license; and the certification and delivery or mailing of copies of decisions under Section 11518 of said Code are hereby delegated to and conferred upon the executive officer, or, in his/her absence from the office of the board, his/her designee.

NOTE: Authority cited: Section 2715, Business and Professions Code. Reference: Section 2708, Business and Professions Code.

(b) All settlement agreements for the revocation, surrender, or interim suspension of a license approved pursuant to section 1403(a) shall be reported at regularly scheduled board meetings.

1410. Application.

(a) An application for a license as a registered nurse by examination shall be submitted on an application form provided by the board, and filed with the board at its office in Sacramento. An application shall be accompanied by the fee and such evidence, statements or documents as therein required including evidence of eligibility to take the examination. The applicant shall submit an additional application and fee for the examination to the board or to its examination contractor, as directed by the board. The ~~B~~board shall provide the contractor's application to the applicant. No license shall be issued without a complete transcript on file indicating successful completion of the courses prescribed by the board for licensure or documentation deemed equivalent by the ~~B~~board.

(b) An application for a license as a registered nurse without examination under the provisions of Section 2732.1 (b) of the code shall be submitted on an application form prescribed and provided by the board, accompanied by the appropriate fee and by such evidence, statements, or documents as therein required, and filed with the board at its office in Sacramento.

(c) The applicant shall be notified in writing of the results of the evaluation of his/her application for license if the application is rejected.

(d) In addition to any other requirements for licensure, whenever it appears that an applicant for a license may be unable to practice nursing safely because the applicant's ability to practice may be impaired due to mental illness, or physical illness affecting competency, the board may require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the board. The board shall pay the full cost of such examination. An applicant's failure to comply with the requirement shall render his or her application incomplete.

The report of the evaluation shall be made available to the applicant.

(e) The Board shall not grant a license to an applicant who was denied a license because it was determined that the applicant's ability to practice nursing was impaired due to mental illness or physical illness affecting competency until it has received competent evidence of the absence or control of the condition which caused its action and until it is satisfied that with due regard for the public health and safety the person's application for licensure may be safely granted.

NOTE: Authority cited: Section 2715, Business and Professions Code. Reference: Sections 480, 820, 2729, 2732.1, 2733, 2736, 2736.5, 2736.6, 2737 and 2815, Business and Professions Code.

1441. Unprofessional Conduct.

In addition to the conduct described in Section 2761 (a) of the Code, "unprofessional conduct" also includes, but is not limited to, the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil ~~dispute~~ action for damages arising from the licensee's practice, whether the agreement is made before or after the filing of an action;

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, ~~medical records~~ the documents.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any

constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board, within 30 days, any of the following:

~~(1) The bringing of an indictment or information charging a felony against the licensee.~~

~~(2) The arrest of the licensee.~~

~~(3)~~ (1) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

~~(4)~~ (2) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 2715, Business and Professions Code. Reference: Sections 2761 and 2765, Business and Professions Code.

1443.6. Required Actions Against Registered Sex Offenders.

(a) Except as otherwise provided, if an individual is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, or military or federal law, the board shall:

(1) Deny an application by the individual for licensure, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Promptly revoke the license of the individual, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and shall not stay the revocation nor place the license on probation.

(3) Deny any petition to reinstate or reissue the individual's license.

(b) This section shall not apply to any of the following:

(1) An individual who has been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender, or whose duty to register has otherwise been formally terminated under California law or the law of the jurisdiction that required registration.

(2) An individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code; provided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to discipline a licensee under any other provision of state law based upon the licensee's conviction under Section 314 of the Penal Code.

(3) Any administrative proceeding that is fully adjudicated prior to the effective date of this regulation. A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition in subsection (a) against reinstating a license shall govern.

NOTE: Authority cited: Section 2715, Business and Professions Code. Reference: Sections 480, 2736, 2750, 2759, and 2760.1, Business and Professions Code; and Section 11425.50, Government Code.

1444.5. Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Board shall consider the disciplinary guidelines entitled: "Recommended Guidelines for Disciplinary Orders and Conditions of Probation" (10/02), which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board, in its sole discretion, determines that the facts of the particular case warrant such a deviation -for example, the presence of mitigating factors; the age of the case; evidentiary problems.

Notwithstanding the disciplinary guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any acts of sexual contact, as defined in subdivision (c) of Section 729 of the Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

NOTE: Authority cited: Section 2715, Business and Professions Code; and Section 11400.20, Government Code. Reference: Sections 726, 729, 2750, 2759, 2761 and 2762, Business and Professions Code; Section 44010, Education Code; and Sections ~~11400.20 and~~ 11425.50(e), Government Code.